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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

LOUIS VANACEK,
Petitioner,

vs.

ST. LOUIS PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

No. 427

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

PETITION FOR A WRIT OF CERTIORARI.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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REFERENCE TO REPORT OF OPINION DELIVERED BELOW.

This cause has not yet been officially reported. The unofficial citation is **Louis Vanacek, Respondent, v. St. Louis Public Service Company, a Corporation, Appellant,** Supreme Court of Missouri, Court en banc, 358 S. W. 2d 808.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

The judgment and decree of the Supreme Court of Missouri herein sought to be reviewed is dated June 11, 1962, and the same was entered June 11, 1962 (Record, page 371, Appendix, p. 19).

The motion of petitioner, respondent below (hereinafter for the convenience called "plaintiff"), for a rehearing in the Supreme Court of Missouri, en banc, was denied and overruled on July 16, 1962 (R. 406, A. 50).

On July 20, 1962, the Supreme Court of Missouri granted plaintiff 90 days from June 11, 1962, within which to petition this Court for certiorari (R. 406, A. 51).

The statutory provision believed by plaintiff to confer on this Court jurisdiction to review the judgment or decree by writ of certiorari is the **Act of June 25, 1948**, c. 646, 62 Stat. 929, 28 U. S. C. A. 1257, which provides that

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

QUESTION PRESENTED FOR REVIEW.

Does an opinion, judgment, and decree of the Supreme Court of Missouri violate Amendment XIV to the Constitution of the United States, by way of denying to a citizen of the United States the equal protection of the laws, where the said opinion, judgment and decree holds that said citizen, the plaintiff, has no case in tort against and may not recover in tort against respondent here (defendant-appellant below, hereinafter for convenience called "defendant"), a common carrier of passengers by means of streetcars and buses, on account of personal injuries sustained by plaintiff while operating a motor vehicle on a public street and directly caused by a condition of disrepair of

said public street for which defendant is ordinarily and regularly liable under applicable city charter provisions and ordinances, and under the common law of Missouri, on the sole and only ground that, though such defect arose while defendant was using tracks on said street for its streetcars, and though such defect continued unchanged to the date of plaintiff's injury, defendant was lawfully permitted to "abandon" said tracks between the time the defect arose and (shortly) before plaintiff's injury, and a contract between defendant and the City of St. Louis, to which plaintiff was not a party, was then entered into and provided that as an incident of such "abandonment" the defendant was "relieved of all future liability of the maintenance" of said tracks "and all paving obligations incident thereto?"

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES.

Section 1 of Amendment XIV to the Constitution of the United States, which reads as follows (adopted July 21, 1868, pp. 288-289, U. S. C. A., "Constitution, Amendments 6 to 14;" emphasis supplied):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No state shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws.**"

STATEMENT OF THE CASE.

The statement of the case made by the Supreme Court of Missouri in its opinion is hereby adopted for that of plaintiff here. It is as follows (Appendix, pp. 20-28):

Plaintiff obtained judgment for $50,000.00 for personal injuries, sustained when the motorcycle he was riding as a member of the Metropolitan St. Louis Police Force went out of control, allegedly as a result of a defect existing in the surface of North Broadway between the rails of a streetcar track. Defendant has appealed and contends that the trial court erred in refusing to direct a verdict for it at the close of all the evidence for the reason that defendant had no duty to plaintiff to maintain the street at the place in question at the time of his injury.

An opinion written in Division One did not receive a majority vote and the case was transferred to Banc. The following statement of facts from the divisional opinion is set out, without quotation marks, and adopted with some additions. In April, 1940, the Board of Public Service of the City of St. Louis issued a permit of indefinite duration (in effect at the times in question) to defendant to continue operation over and maintenance of existing street railway tracks and appurtenances located upon certain public streets in St. Louis including North Broadway. By charter and ordinance, St. Louis required defendant to keep the street between the rails of its tracks, and to the extent of at least 12 inches outside each rail, in perfect repair and as nearly on a level with such rails as practicable.

In July, 1956, the Missouri Public Service Commission, pursuant to defendant's application and after extensive findings of fact, entered its order permitting defendant "to abandon the street railway tracks of its Broadway

car line (Route No. 40) and all streetcar service thereover," except tracks used in connection with the operation of other streetcar lines (not here involved) and upon the condition that defendant substitute motorbuses not later than September 30, 1956. That order was dated July 17, 1956, and was effective July 27, 1956. Seven days after the order's date, defendant and the city entered into a contract which recited defendant's application to the commission, the commission's order, and that the city and the company desired to agree "for the purpose of settling and determining the Company's obligations at the time of the abandonment of said street car service pursuant to said Commission proceedings, with respect to the abandoned street car tracks of the said Broadway Car Line, located in paved streets in the City of St. Louis, the disposition of poles, wires, tracks, and other appurtenances thereof, and the question of title to such property, and others matters * * *." The agreement then provided that, when the company abandoned the tracks and service on route 40, defendant was to give formal written notice thereof to the Director of Streets and Sewers and deliver a check to the city in the sum of $125,780.00 to be used by the city in maintaining, surfacing and otherwise improving the abandoned track areas and any remainder would be used to repair roadway paving at bus stops. The agreement further provided that after such formal notification the city would assume responsibility for any resurfacing of the abandoned car tracks and title to all said tracks including the rails, ties, and other track fixtures and appurtenances "is hereby vested to the City and the City assumes full possession and control thereof (this agreement being construed as a quitclaim deed thereto), and from said date forward the Company and its successors and assigns are relieved of all future liability of the maintenance, repair or removal of said tracks and all paving obligations incidental thereto * * *."

In a letter dated August 31, 1956, defendant formally notified the city of its abandonment of service and trackage as of August 20 and enclosed a check to the city in the amount above noted, which check was received by the comptroller on September 4, 1956. However, the city had made no changes or repairs in the area where plaintiff was injured before the time of his injury.

In the afternoon of October 13, 1956, plaintiff, in pursuit of a suspected speeder, was operating his motorcycle north on North Broadway near Dickson Street and between the rails of the northbound streetcar track when he lost control of the motorcycle, fell from it and was injured. As plaintiff proceeded north for four or five blocks his motorcycle was about midway between the rails of the northbound streetcar track and he was gaining slightly on the automobile, attempting to get in a position to check its speed without calling attention of the driver to the fact that he was being pursued. When he reached a place about 20 feet or so south of Dickson Street, his motorcycle ran into a depression or rut (about four or five inches wide and two or three inches deep) running parallel with and along the inside of the east rail of the northbound track for a distance of several feet. Within a few feet thereafter, the motorcycle struck a galvanized sheet metal plate about a foot long by six inches wide, and a fraction (perhaps 1/8th) of an inch thick. An end or corner of that plate was wedged under the east rail and the plate protruded generally westwardly through the rut and out of it onto the surface of the street. Apparently the metal plate had been run over by heavy vehicles. In any event, it was flat against and conformed to the irregularities of the area it covered. There was no evidence that defendant was responsible for the presence of the metal plate. The motorcycle went out of control, traveled northeastwardly and struck Broadway's east curb. Plaintiff was

thrown to the sidewalk at a place about 141 feet northeast of the metal plate.

Broadway's surface at the area in question (including the area from Franklin to Dickson), both to the east of the east rail and between the rails of the northbound track, was paved with cobblestones which had been covered in some areas with asphalt. The street's surface was rough and at places was somewhat rougher between the northbound rails than it was east of the track. Plaintiff had traveled the portion of Broadway in question many times and was familiar with the fact that the street's surface was rough and that care was required to traverse it safely on a motorcycle. He had increased his speed so that at the time of the accident he was going 35 or 36 miles per hour. He did not sound his siren or operate a red light. At the time the motorcycle entered the rut plaintiff was attempting to watch the automobile ahead of him and his speedometer, and at the same time pay some attention to his direction and the condition of the street. The evidence indicates the rut had existed for some time before the date of the contract between defendant and the city; and we consider it was shown that the condition of the rut at least was a concurring cause of plaintiff's motorcycle taking the course it did.

The federal questions heretofore set forth in this petition were specifically raised by plaintiff in his Motion for Rehearing filed in the Supreme Court of Missouri after the opinion of the Court en banc was filed (Record pp. 382-384; Appendix, pp. 29-31). The said questions were passed on by the Supreme Court of Missouri generally and without further opinion or comment, by denial of said Motion (Record, p. 406; Appendix, p. 50).

ARGUMENT.

I.

The law of torts applicable to occurrences taking place within the State of Missouri ordinarily and regularly afforded plaintiff a remedy against defendant, under the facts stated by the Supreme Court of Missouri.

Such law is stated and analyzed in the opinion filed in Division 1 of said Court by Hon. Cullen Coil, Commissioner (R. 385; A. 31), which reads in part as follows (and which is hereby adopted by plaintiff as this portion of his argument):

Defendant contends that the decisive issue is whether it had the duty to maintain the tracks and street **after** it had lawfully abandoned the tracks and divested itself of title to the rails by a contract with the city. There is no doubt that defendant's duty to exercise care to maintain the street in a reasonably safe condition for travel ceased upon its abandonment of the tracks and service thereover pursuant to lawful authority and pursuant to an agreement with the city, except perhaps a duty to the public after abandonment to remove the rails and restore the street. 83 C. J. S., Street Railroads, § 121, p. 240; Pennsylvania Dept. of Highways v. Pennsylvania Public Utility Commission, Pa. Super., 98 A. 2d 199, 201 [1-3]. But inasmuch as plaintiff relies on no such duty (after abandonment) we shall proceed upon the premise that at the time of plaintiff's injury, defendant had no duty to maintain the street in a reasonably safe condition. We do not agree, however, that the fact that no duty existed to maintain the street **after** abandonment or **at the time of plaintiff's injury** is decisive of the issue presented.

It is undisputed that defendant, prior to the time of its abandonment of service and tracks, had a continuing and

nondelegable duty to exercise ordinary care to maintain the portion of the street in question in a reasonably safe condition for the use of the public. Such was defendant's duty both under the common law and by virtue of the St. Louis charter and ordinance above noted. 83 C. J. S., Street Railroads, § 112, p. 229; 55 Am. Jur., Urban Transportation, § 110, p. 108; Burow v. St. Louis Public Service Co., Mo., 100 S. W. 2d 269, 270 [1, 2]. That duty was owed by defendant to every member of the traveling public, including plaintiff. Lowery v. Kansas City, Mo., 85 S. W. 2d 104, 110 [4-7]. Defendant breached that duty by omitting to repair the defect in the street at the time it had the duty to so do and at a time when it reasonably could have foreseen that its failure to perform that duty was likely to result in future injury to members of the traveling public; and if a breach of that duty was a substantial factor in causing injury and damage to plaintiff, Hildreth v. Key, Mo. App., 341 S. W. 2d 601, 607 [12-14], it would appear that a submissible case was made insofar as concerns the contention being here discussed.

It seems apparent that defendant's omission to repair when it had a duty to the public, including plaintiff, to do so, was a substantial factor along with the joint negligence of the city which had the nondelegable duty to exercise care to maintain its streets in a reasonably safe condition, Fosmire v. Kansas City, Mo., 260 S. W. 2d 252, 254 [2, 3], in causing injury and damage to plaintiff and thus defendant's negligence constituted a legal or proximate cause. Hildreth v. Key, supra. In the circumstances of this case, including the relationship of the parties, i. e., plaintiff being a member of the class to whom defendant owed the duty to repair at the time it had that duty, the fact that at the time of the injury defendant no longer had the duty to maintain the street in a reasonably safe condition is of no decisive consequence. Plaintiff relies

upon a breach of a duty committed at a time when defendant admittedly had the duty; he does not rely upon any breach of duty after defendant's duty had ceased to exist.

We recognize the fact that under our ruling herein one in the position of this defendant is liable for his negligence irrespective of the fact that a period of time has intervened between the time of its breach of duty and the time injury resulted to the one to whom it owed that duty. But, as pointed out in Comment H to Section 433, pages 1170 and 1171, Restatement, Torts, Negligence: "Experience has shown that where a great length of time has elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof. Where the time has been long, the effect of the actor's conduct may thus become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed. However, where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm."

In the present case it seems to us evident that defendant's negligence was a substantial factor in producing plaintiff's injury despite the intervention of a period of five or six weeks between the time of the breach of duty and the time of the injury.

While defendant's brief has stressed the fact and the content of its contract with the city, we understand that it does not contend that the contract, insofar as here relevant, did more than relieve it of its future, i. e., after abandonment, liability to exercise ordinary care to maintain the street in reasonably safe condition. Thus, the contract is of no decisive import because for the purposes of this case it is conceded that defendant had no duty to

maintain the street after its lawful abandonment of service and tracks. No question is before us as to the effect of the contract as between the parties to it; for example, we are not concerned with whether the city may be liable over to defendant.

We have found no case which has ruled similar facts. The question here presented may have existed, but was not decided, in the case of Wells v. City of Jefferson, Mo., 132 S. W. 2d 1006. There plaintiff brought an action against the city and Missouri Power & Light Company, which company had operated a street railroad on the city streets, for damages for an alleged injury caused by the defective condition of the street close to the rails of a streetcar track. The trial court directed a verdict for the company and the jury found for the city. On appeal one of plaintiff's assignments of error was that the trial court had erred in directing a verdict for the company. That assignment was not briefed and this court held that it had been abandoned and thus did not rule it. The facts in that case tended to show that plaintiff claimed to have been injured on April 21, 1934, after the streetcar tracks had been out of use for several months. The company had been granted permission to discontinue streetcar and substitute bus service in November 1933. The city had commenced to remove streetcar tracks but whether pursuant to an agreement with Missouri Power & Light Company is not disclosed. In any event, the particular tracks in question had not been removed and plaintiff's evidence showed that the defects had existed for two or three months. The opinion further shows that plaintiff contended on appeal that the trial court erred in admitting in evidence a minute entry of the city council dated February 3, 1934, which plaintiff said in its assignment of error "did not even import any final action, on the question of removing street car tracks from the city streets." It does not appear, therefore, just when the abandonment

occurred and thus it is also not clear whether the defect of which plaintiff complained existed prior to the abandonment of the tracks or only subsequent thereto. The obvious reason that the case does not disclose those matters with particularity is because, as heretofore noted, the entire contention as to the liability of the Power & Light Company was abandoned and was no longer in the case. This court did comment, in connection with its stated refusal to consider or rule the question (132 S. W. 2d 1007): "Of course, this defendant's [the company's] liability would depend upon whether its duty with reference to the track still existed. Burow v. St. Louis Public Service Co., 339 Mo. 1092, 100 S. W. 2d 269. However, this assignment is not briefed; no further mention is made of it, either in the points and authorities or argument, and no case is cited which considered any similar state of facts. This constituted an abandonment of this assignment. Clay v. Owen, 338 Mo. 1061, 93 S. W. 2d 914; Homan v. Mo. Pac. R. Co., 334 Mo. 61, 64 S. W. 2d 617. * * * It is, therefore, unnecessary to go into the facts concerning the taking over of the street car tracks by the City for salvage or otherwise." (Bracketed insert the present writer's.) The Burow case cited in the quotation above holds only that in the widening of St. Charles Road there involved the streetcar company was under no duty to the public because the roadway in question was a state highway and under the Constitution the Highway Commission controlled that highway and pursuant to that control had planned and executed the widening thereof, and the company could not have interfered either with the Highway Commission's plan for or with the construction in question. The court concluded that inasmuch as defendant owed no duty to the public, it was not liable to plaintiff, a member of the public. We are of the opinion that the comment in the Wells case above set forth did not and was not meant to rule the question here presented.

Defendant relies on Combow v. K. C. Ground Inv. Co., Mo., 218 S. W. 2d 539. That case holds that absent an express agreement to the contrary the seller of real estate is not liable for defective conditions of the premises. No vendor-vendee relationship exists in the present case and the questions in the two cases are wholly dissimilar. Defendant sold certain rails to the city, but by no stretch of the imagination does that fact change the relationship in the present case to one to which the principles governing liability as between a vendor of real property and his vendee are applicable.

Defendant relies on Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751. Kansas City's limits were extended and a street theretofore outside the city and which had been maintained by the county was within the new city limits. The court held that the city had the duty thereafter to maintain that street and was liable to a traveler for a negligent breach of that duty. The accident in the Foster case occurred after the city became responsible for the street and only the city was sued.

Defendant relies upon Cummings v. Halpin, Mo. App., 27 S. W. 2d 718. Kansas City had entered into a contract with a construction company to reduce the grade of one of the city's streets. A provision of the contract was that any sidewalks removed during the progress of the work should be relaid by the contractor in a manner satisfactory to the city. The contractor removed a walk and after finishing the grading, replaced the walk by placing large chunks of concrete from the former sidewalk along the side of the graded street. Plaintiff, going to a neighborhood store, was injured while using the walk when one of the concrete fragments tilted. The court held that there was no liability on the construction company because the city had accepted the work three days prior to the time plaintiff was injured. The court relied upon

the rule stated in its prior case of Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330, that usually a contractor was not liable to third parties who had **no contractual relations with it** for damages subsequently sustained by reason of its negligence in the performance of contract duties, and further that the intervening negligence of the city or other party who accepted the work was the proximate cause of the injury, that negligence having superseded the original negligence of the contractor. Privity between a contractor and an injured party is probably not now necessary. Krisovich v. John Booth, Inc., Pa. Super., 121 A. 2d 890, and the city's acceptance could not have been intervening negligence or a superseding cause for the reason that clearly the city's acceptance was nothing more than an act of concurring negligence. Seeley v. Hutchison, Mo., 315 S. W. 2d 821, 826 [6-8]. Be that as it may, however we need not decide whether the Cummings case is correctly ruled, because in no event is it applicable to any question here. In the present case there is involved no question of negligence of a contractor who has performed work under a contract with a municipality. In this case, defendant owed a continuing common-law duty to the public and no question of privity or of acceptance by the city of work tendered as compliance with a contract is involved.

In the present case defendant owed a continuing duty until abandonment not to injure a member of the public by negligently failing to keep the street in a reasonably safe condition. A breach of that duty (committed before abandonment) caused injury to plaintiff, a member of the class to whom the duty was owed. Under the applicable principles of tort law, the trial court correctly refused to direct a verdict for defendant on the ground asserted.

II.

The Supreme Court of Missouri reversed plaintiff's jury verdict outright and denied him any recovery for his injuries on the sole and only ground that the provisions of the contract between the City of St. Louis and defendant, as referred to in the opinion of the Court en banc (R. 372-379; A. 21) extinguished any duty defendant ordinarily had and owed to plaintiff under the ordinary and regular law of torts as interpreted and administered by said Court.

That is perfectly apparent from that portion of the opinion set out at R. 379 (A. 21-28), and from the nature of said ordinary and regular law of torts set forth under I of this Argument.

III.

The Supreme Court of Missouri, by its said opinion, judgment, and decree, therefore denied to plaintiff the equal protection of the law of torts of Missouri, and thereby the State of Missouri violated Section 1 of Amendment XIV of the federal Constitution, because:

A) No State may deny to a citizen of the United States the equal protection of the laws, even though he is a resident of that State which undertakes to do so. **Colgate v. Harvey**, Vt. 1935, 56 S. Ct. 252, 296 U. S. 404, 428, 80 L. Ed. 299, 102 A. L. R. 54.

B) Section 1 of Amendment XIV of the federal Constitution applies to action taken by a State court as well as to action taken by any other agency of a State government. **Ex parte Virginia**, Va. 1880, 100 U. S. 339, 346-347, 10 Otto 339.

C) A judicial decree which violates vested rights is within the protection of the XIV Amendment. **Ladner v. Seigel**, 1930, 148 A. 699, 702, 298 Pa. 487.

D) A "vested right" or "privilege of a citizen of the United States" is that which every person has under U. S. C. A., 1981 (R. S. 1977, as derived from Act May 31, 1870, c. 114, para. 16, 16 Stat. 144), and in every State, "to sue, be parties, give evidence, **and** to the full and equal benefit of all laws and proceedings for the security of persons and property." (Emphasis supplied.)

These federally-created rights and privileges apply to all persons whether negro or white or of some other color, etc. **U. S. v. Wong Kim Ark**, Cal. 1898, 18 S. Ct. 456, 169 U. S. 649, 695-696, 42 L. Ed. 890; **Kentucky v. Powers**, C. C. Ky. 1905, 139 F. 452, 495, the purpose of the statute being to enforce the XIV Amendment. **Davis v. Foreman**, C. A. Ill. 1958, 251 F. 2d 421, 422.

E) If a Missouri court (including the Supreme Court of Missouri) refuses to apply the Missouri law (of torts) as ordinarily, regularly, and usually applied to a fact situation and for the benefit of persons suing under such law applicable to such facts to a plaintiff seeking to avail himself of such law under identical facts, on the sole and only ground that third parties have contracted away the applicability of such facts and a resort to such law as to him, then Amendment XIV is violated.

We have shown under I above that the Missouri law of torts regularly and ordinarily applied to plaintiff in his action below.

We have shown under II above that the Supreme Court of Missouri denied plaintiff recourse to said law solely because of the provisions of the contract between defendant and the City of St. Louis.

We have shown under A), B), C), and D), supra, of this Section III of this argument that Amendment XIV, sect. 1, and 1981 U. S. C. A., enacted to enforce the Amendment, apply to plaintiff, his cause, and the State of Missouri acting as it did by the Supreme Court thereof.

Was such action wrong?

In **Shelley v. Kraemer**, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, it appears that petitioners, who were negroes and defendants in the trial court in the City of St. Louis, bought a house and lot in the City of St. Louis.

Years before, the then owners of said lot and surrounding lots entered into a contract, or "restrictive covenant" (to which petitioners were of course strangers, and of which they had no actual knowledge), providing against use or occupancy of any of the property involved by negroes.

Upon petitioners obtaining a warranty deed, other lot owners in the vicinity brought an injunction proceeding to restrain petitioners from taking possession and to divest title out of them.

The trial court denied the relief sought, but the Supreme Court of Missouri, en banc, granted the same and enforced the contract or "restrictive covenant". (l. c. 6, 334 U. S.)

This Court granted certiorari, and the opinion shows that petitioners relied on Section 1 of Amendment XIV as implemented by a section of the same Civil Rights Act we have heretofore discussed herein (l. c. 8, 11, 334 U. S.).

This Court held that the State of Missouri, acting by and through the Supreme Court of Missouri, by and through its opinion, judgment, and decree (l. c. 14, 15, 334 U. S.), had violated Amendment XIV of the federal Constitution by denying petitioners the equal protection of the laws, and therefore this Court reversed the Supreme Court of Missouri (l. c. 23, 334 U. S.).

We appreciate no difference, so far as the basic law is concerned, between that case and this.

There, the ordinary and regular Missouri law of real property permitted ownership of and entry onto lands by all persons, but the Supreme Court of Missouri denied such ownership and entry to petitioners on the sole and only ground that strangers to petitioners had contracted away their right to resort to such general law.

Here, the ordinary and regular Missouri law of torts permitted all travelers upon the highway to recover from defendant under the facts and circumstances of plaintiff's injury, but the Supreme Court of Missouri denied plaintiff recovery upon the sole and only ground that strangers to him had contracted away his right to resort to such general law.

It is respectfully submitted that this Court ought to grant petitioner a writ of certiorari to the Supreme Court of Missouri in this cause, and that upon a hearing thereon, this Court ought to reverse the Supreme Court of Missouri herein and restore to plaintiff his money judgment had in the trial court.

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APPENDIX.

JUDGMENT OF THE SUPREME COURT OF MISSOURI.

"And afterwards on June 11, 1962, the following among other proceedings were had and entered of record, to wit:

Louis Vanacek, Respondent,

48,474. vs.

St. Louis Public Service Company, a Corporation, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent costs and charges herein expended, and have execution therefor. (Opinion filed.) (Transcript $225.00, Docket Fee $10.00. Total $235.00.)

Which said opinion is in words and figures as follows, to wit:

(R. 371.)

OPINION OF THE SUPREME COURT OF MISSOURI.

(R. 372-379.)

In the Supreme Court of Missouri.
Court En Banc.

April Session, 1962.

Louis Vanacek,
Respondent,

vs.

No. 48,474.

St. Louis Public Service Company,
a Corporation,
Appellant.

Appeal from the Circuit Court of the City of St. Louis.
Honorable Franklin E. Reagan, Judge.

Plaintiff obtained judgment for $50,000.00 for personal injuries, sustained when the motorcycle he was riding as a member of the Metropolitan St. Louis Police Force went out of control, allegedly as a result of a defect existing in the surface of North Broadway between the rails of a streetcar track. Defendant has appealed and contends that the trial court erred in refusing to direct a verdict for it at the close of all the evidence for the reason that defendant had no duty to plaintiff to maintain the street at the place in question at the time of his injury.

An opinion written in Division One did not receive a majority vote and the case was transferred to Banc. The following statement of facts from the divisional opinion is set out, without quotation marks, and adopted with some additions. In April, 1940, the Board of Public Service

of the City of St. Louis issued a permit of indefinite duration (in effect at the times in question) to defendant to continue operation over and maintenance of existing street railway tracks and appurtenances located upon certain public streets in St. Louis including North Broadway. By charter and ordinance, St. Louis required defendant to keep the street between the rails of its tracks, and to the extent of at least 12 inches outside each rail, in perfect repair and as nearly on a level with such rails as practicable.

In July, 1956, the Missouri Public Service Commission, pursuant to defendant's application and after extensive findings of fact, entered its order permitting defendant "to abandon the street railway tracks of its Broadway car line (Route No. 40) and all streetcar service thereover," except tracks used in connection with the operation of other streetcar lines (not here involved) and upon the condition that defendant substitute motorbuses not later than September 30, 1956. That order was dated July 17, 1956, and was effective July 27, 1956. Seven days after the order's date, defendant and the city entered into a contract which recited defendant's application to the commission, the commission's order, and that the city and the company desired to agree "for the purpose of settling and determining the Company's obligations at the time of the abandonment of said street car service pursuant to said Commission proceedings, with respect to the abandoned street car tracks of the said Broadway Car Line, located in paved streets in the City of St. Louis, the disposition of poles, wires, tracks, and other appurtenances thereof, and the question of title to such property, and other matters * * *." The agreement then provided that when the company abandoned the tracks and service on route 40, defendant was to give formal written notice thereof to the Director of Streets and Sewers and deliver

a check to the city in the sum of $125,780.00 to be used by the city in maintaining, surfacing and otherwise improving the abandoned track areas and any remainder would be used to repair roadway paving at bus stops. The agreement further provided that after such formal notification the city would assume responsibility for any resurfacing of the abandoned car tracks and title to all said tracks including the rails, ties, and other track fixtures and appurtenances "is hereby vested to the City and the City assumes full possession and control thereof (this agreement being construed as a quitclaim deed thereto), and from said date forward the Company and its successors and assigns are relieved of all future liability of the maintenance, repair or removal of said tracks and all paving obligations incidental thereto * * * ."

In a letter dated August 31, 1956, defendant formally notified the city of its abandonment of service and trackage as of August 20 and enclosed a check to the city in the amount above noted, which check was received by the comptroller on September 4, 1956. However, the city had made no changes or repairs in the area where plaintiff was injured before the time of his injury.

In the afternoon of October 13, 1956, plaintiff, in pursuit of a suspected speeder, was operating his motorcycle north on North Broadway near Dickson Street and between the rails of the northbound streetcar track when he lost control of the motorcycle, fell from it and was injured. As plaintiff proceeded north for four or five blocks his motorcycle was about midway between the rails of the northbound street car track and he was gaining slightly on the automobile, attempting to get in a position to check its speed without calling attention of the driver to the fact that he was being pursued. When he reached a place about 20 feet or so south of Dickson Street, his motorcycle ran into a depression or rut (about four or

five inches wide and two or three inches deep) running parallel with and along the inside of the east rail of the northbound track for a distance of several feet. Within a few feet thereafter, the motorcycle struck a galvanized sheet metal plate about a foot long by six inches wide, and a fraction (perhaps 1/8th) of an inch thick. An end or corner of that plate was wedged under the east rail and the plate protruded generally westwardly through the rut and out of it onto the surface of the street. Apparently the metal plate had been run over by heavy vehicles. In any event, it was flat against and conformed to the irregularities of the area it covered. There was no evidence that defendant was responsible for the presence of the metal plate. The motorcycle went out of control, traveled northeastwardly and struck Broadway's east curb. Plaintiff was thrown to the sidewalk at a place about 141 feet northeast of the metal plate.

Broadway's surface at the area in question (including the area from Franklin to Dickson), both to the east of the east rail and between the rails of the northbound track, was paved with cobblestones which had been covered in some areas with asphalt. The street's surface was rough and at places was somewhat rougher between the northbound rails than it was east of the track. Plaintiff had traveled the portion of Broadway in question many times and was familiar with the fact that the street's surface was rough and that care was required to traverse it safely on a motorcycle. He had increased his speed so that at the time of the accident he was going 35 or 36 miles per hour. He did not sound his siren or operate a red light. At the time the motorcycle entered the rut plaintiff was attempting to watch the automobile ahead of him and his speedometer, and at the same time pay some attention to his direction and the condition of the street. The evidence indicates the rut had existed for some time before the

date of the contract between defendant and the city; and we consider it was shown that the condition of the rut at least was a concurring cause of plaintiff's motorcycle taking the course it did.

"A fundamental test of whether one person has a cause of action in tort against another is: Did the person, sought to be held liable, owe to the person, seeking to recover, any duty, to do something he did not do, or not to do something he did do? If so, his failure to do what he ought to have done or his doing what he ought not to have done, constitutes a legal wrong, whether it be intentional or merely negligent, for which the person injured thereby can recover, except where his own fault is a contributing cause." Lowery v. Kansas City, 337 Mo. 47, 85 S. W. 2d 104, 110. As stated in the dissenting opinion in Division: Actionable negligence is negligence to the particular person injured. The basis of an action for negligence must be a violation of plaintiff's own right. 38 Am. Jur. 660, Negligence Sec. 18; 65 C. J. S. 332, Negligence, Sec 4. The obligation must be due from defendant to the person injured. Davidson v. St. Louis-San Francisco Ry. Co., Mo. Sup., 229 S. W. 786, 788; Karr v. Chicago, R. I. & P. Ry. Co., 341 Mo. 536, 108 S. W. 2d 44, 49, and cases cited. It is not enough to show that the obligation was to another person or class, and that if performed as to them, plaintiff would not have been injured. "The wrongfulness of an act is found in its probable effect upon persons who are in some relation to the actor." As to unrelated parties, the happening is a pure accident. Facts which create a relation and therefore a duty as to one person do not establish the same obligation to all mankind. Accordingly, to be within the right created, the complaining party must show facts which make the reason for claiming a relationship applicable to him." 38 Am. Jur. 661. In some situations the duty to use due care is general and owing to

everybody. "A duty, however, which is owing to everybody cannot serve as the basis of an action for negligence until some individual is placed in position which gives him occasion to insist upon its performance." 38 Am. Jur. 661, Negligence, Sec. 19. It then becomes a duty to him personally. 3 Cooley on Torts, 4th Edition, Sec. 478, page 366; Upp v. Darner, Iowa Sup., 130 N. W. 409, 410.

Defendant Public Service Company owed the general traveling public a duty to keep the street in repair as long as it enjoyed its license as a carrier to operate its Broadway streetcar line. During the time it owed that duty, however, plaintiff was not placed in a position which gave him occasion to insist upon its performance. It was not until the relationship between the carrier and the public came to an end and the duty no longer existed that plaintiff's injury occurred and his rights arose. When plaintiff was injured, defendant had no duty to anyone to repair the street along the streetcar tracks. It no longer owned or used the tracks and had no right, authority or duty to make any alteration, change or repair of the pavement of the street where they were. The city had taken over the tracks, become the owner of the rails, and it alone had the right, authority and duty to repair the street and keep it in good condition. See Wells v. City of Jefferson, 345 Mo. 239, 132 S. W. 2d 1006; Burow v. St. Louis Public Service Co., 339 Mo. 1092, 100 S. W. 2d 269; Cummings v. Halpin, Mo. App., 27 S. W. 2d 718; Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751. An action for negligence will not lie unless it appears that there existed, **at the time of the injury**, some legal duty or obligation on the part of defendant toward plaintiff, which defendant did not perform. (Emphasis ours.) 38 Am. Jur. 652, Negligence, Sec. 12; 83 C. J. S. 446, Street Railroads, Sec. 302 b; 65 C. J. S. 872, Negligence, Sec. 186 a; The Evansville and Terre Haute R. R. Co. v. Griffin, 100

Ind. 221, 222. At the time of plaintiff's injury, defendant not only owed no duty with respect to street repair to any member of the public but had no right whatever to make repairs. Therefore, plaintiff's only recourse was against the city under its duty to maintain the streets in a reasonably safe condition for the traveling public. Foster v. Kansas City, supra. We base our decision on complete lack of any duty and not on any theory of intervening cause.

Plaintiff relies on a breach of duty at the time when defendant did have the duty to repair and cites A. L. I. Restatement of Torts, Sec. 433, Comment h, at pages 1170-1171, as follows: "Experience has shown that where a great length of time has elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof. Where the time has been long, the effect of the actor's conduct may thus become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed. However, where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm." However, this does not say it applies to a party's failure to act (nonfeasance), which caused no injury while such party had a duty to act, but where instead the injury resulted from the later failure of another to act (who then had the duty to act) after the duty to act of the party sought to be held had terminated. As to a force put in motion, the actual creation of a dangerous condition or the concealment of a dangerous condition the situation would be different. (See Secs. 352, 353, 354, 373, 374, 375, 376, Restatement of Torts.) The principles stated by these sections, as between vendor and vendee of land, are that

the vendor is not liable to the vendee or others for any existing dangerous condition (after the vendee takes possession) unless the vendee does not know of it and the vendor does know of the condition and the risk involved and has reason to believe the vendee will not discover the condition and realize the risk. See also Combow v. Kansas City Ground Inv. Co., 358 Mo. 934, 218 S. W. 2d 539, 541, 8 A. L. R. 2d 213, Annotation, 8 A. L. R. 2d 218. Under these principles, a vendor, who has permitted land to be in dangerous disrepair, is liable to persons outside the land (after the vendee takes possession) only if the vendee does not know of the condition and the vendor does know of it and conceals it or fails to exercise reasonable care to disclose it to the vendee when he has reason to believe the vendee will not discover it. It is our view that the same principles are logically and reasonably applicable to the situation presented in this case. Here such condition as existed was not created by any affirmative action of defendant, but was no more than a condition of disrepair (apparently the result of wear from use) and one that was open and obvious. Thus there was no reason to believe the city would not know as much about it as defendant, especially since it had taken title to the tracks and had been paid a large sum by defendant for the very purpose of repairing this street.

These principles also provide the answer to plaintiff's claim that the city could not by contract relieve defendant from liability for failure to repair prior to the date of the contract arguing that this would be an unconstitutional exercise of power against public policy and in the nature of an ex post facto law. This contention fails to recognize the principles upon which defendant's liability must be based, namely, duty to repair at the time of the injury, and that when duty to repair ends liability for future injury due to disrepair ends, unless there is concealment or

some other circumstances such as those hereinabove discussed. There were no such circumstances in this case and we hold defendant was not liable for plaintiff's injuries.

The judgment is reversed.

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Laurance M. Hyde,
Judge.

Eager, Storckman, Leedy and Dalton, JJ., concur; Westhues, C. J., and Hollingsworth, J., dissent.

PETITIONER'S MOTION FOR REHEARING IN THE SUPREME COURT OF MISSOURI.

Comes now respondent (hereinafter called "plaintiff"), and moves the Court for a rehearing.

For ground of such motion, plaintiff states:

That the Court, as shown by its opinion, has overlooked and misinterpreted the following material matters of law:

A) The Court has overlooked and misinterpreted the entire material, ruling, and governing body of law applicable to this cause. Said body of law is set forth, explained, supported by citation of applicable and ruling authority, and correctly applied to the correctly therein stated facts of this case in the Opinion of Hon. Cullen Coil, Commissioner of this Court, which opinion was heretofore filed herein in Division No. 1 of this Court and there concurred in by Hon. Lawrence Holman, Commissioner.

A true copy of said opinion of said Hon. Cullen Coil is hereto attached as "Exhibit A" to this Motion, and each word and figure of said opinion is hereby adopted by plaintiff by this reference thereto as ground of this Motion.

B) The Court has overlooked and misinterpreted the Constitution of the United States of America, and particularly Amendment XIV thereof and the provisions of said Amendment XIV to said Constitution, in that the State of Missouri, through this Court, as shown by its opinion, has made and enforced stated law which:

1. Abridges the privileges of a citizen of the United States, to-wit, this plaintiff, by holding and ruling and adjudging in its said opinion that this plaintiff's right and privilege to sue and recover from the appellant St. Louis Public Service Company, a corporation (hereinafter called "defendant"), under the law of torts has been extinguished by virtue of and under the provisions of a private contract and agreement by and between the defendant and a third party, to-wit, the City of St. Louis, a municipal corporation; to which said private contract this plaintiff was no party and to which he did not assent.

2. Denied to a person within the jurisdiction of the State of Missouri, to-wit, this plaintiff, the equal protection of the laws, in that the Court in said opinion holds, rules, and adjudges that the regular and/or ordinary principles of the law of torts, as heretofore and now enunciated by this Court for all persons within the jurisdiction of the State of Missouri, shall not and do not apply to this plaintiff for the stated and supposed reason that two strangers to this plaintiff, to-wit, the defendant and said City of St. Louis are in said opinion held to have contracted away and taken away plaintiff's right as such person to have resort to such principles of said law of torts in common with all persons within said jurisdiction; all without plaintiff's assent to the said agreement between defendant and said City.

3. Denied to a person within the jurisdiction of the State of Missouri, to-wit, this plaintiff, the equal protec-

tion of the laws, in that, as shown by the facts of the cause (as recognized by the Court in its opinion), the plaintiff was a traveler on a public highway within the City of St. Louis and State of Missouri at the time of the casualty; a valid Charter provision and Ordinance provision of the City of St. Louis, as shown in evidence had required the defendant to maintain said highway at the point in question in a safe condition; defendant had violated said Charter and Ordinance, and as a proximate result thereof the highway there was not in a safe condition at the time of the casualty; no factual independent intervening cause interposed between the time of said violation and the time of said casualty and injury immediately resulting to plaintiff; on account of these facts, recognized by this Court in said opinion, plaintiff was entitled to recover against defendant under the law of torts applicable to the rights of all travelers on the said public highway at said point; yet the Court, as shown by its opinion, ruled against plaintiff, denied him such right to resort to such law as such traveler, and ruled this cause against him and took away his jury verdict on an erroneous and inapplicable theory arising (or stated to arise) under the law applicable to licensees or invitees upon private property owned by private entities; and under the law applicable (or stated to be applicable) in cases of vendors and vendees of private real property and the rights of third parties dependent on sales or transfers of private real property, all on the ground that defendant and said City had contracted and agreed in said contract that the same was to be construed as a "quit-claim deed" of private real property, though in truth and in fact and under the law no private real property (or any other property) was transferred in or by virtue of said contract, which in truth and in fact merely provided for the incidents (between only the parties thereto) of a relinquishment by defendant of a privilege it had held

to use the property of this plaintiff, as a member of the public, for its own pecuniary gain and profit.

Plaintiff did not assent to said contract, nor that the same should be construed as a "quit-claim deed" so as to affect his rights as a stranger thereto and as a member of the public traveling on a public street and highway.

Exhibit A.

In the
Supreme Court of Missouri,
Division Number One.

September Session, 1961.

Louis Vanacek,
Respondent,

vs.

St. Louis Public Service Company,
a Corporation,
Appellant.

No. 48,474.

Appeal from the Circuit Court of the City of St. Louis,
Honorable Franklin E. Reagan, Judge.

A jury awarded Louis Vanacek $50,000 as damages for injuries sustained when the motorcycle he was riding as a member of the Metropolitan St. Louis Police Force went out of control, allegedly as a result of a defect existing in the surface of North Broadway between the rails of a streetcar track. St. Louis Public Service Company, the sole defendant below (the parties will be referred to herein as they were designated in the trial court) has appealed from the ensuing judgment and contends first that the trial court erred in refusing to direct a verdict for it at the close of all the evidence for the reason that defend-

ant had no duty to plaintiff to maintain the street at the place in question at the time of his injury. The evidence tended to show, and it is undisputed, that in April 1940 the Board of Public Service of the City of St. Louis issued a permit of indefinite duration (in effect at the times in question) to defendant to continue operation over and maintenance of existing street railway tracks and appurtenances located upon certain public streets in St. Louis including North Broadway. By charter and ordinance, St. Louis required defendant to keep the street between the rails of its tracks and to the extent of at least 12 inches outside each rail in perfect repair and as nearly on a level with such rails as practicable.

In July 1956 the Missouri Public Service Commission, pursuant to defendant's application and after extensive findings of fact, entered its order permitting defendant "to abandon the street railway tracks of its Broadway car line (Route No. 40) and all streetcar service thereover" except tracks used in connection with the operation of other streetcar lines and upon the condition that defendant substitute motorbuses not later than September 30, 1956. That order was dated July 17, 1956, and was effective July 27, 1956. Seven days after the order's date, defendant and the city entered into a contract which recited defendant's application to the commission, the commission order, and that the city and the company desired to agree "for the purpose of settling and determining the Company's obligations at the time of the abandonment of said street car service pursuant to said Commission proceedings, with respect to the abandoned street car tracks of the said Broadway Car Line, located in paved streets in the City of St. Louis, the disposition of poles, wires, tracks, and other appurtenances thereof, and the question of title to such property, and other matters * * *." The agreement then provided that when the company aban-

doned the tracks and service on route 40, defendant was to give formal, written notice thereof to the Director of Streets and Sewers and deliver a check to the city in the sum of $125,780 to be used by the city in maintaining, surfacing and otherwise improving the abandoned track areas and any remainder would be used to repair roadway paving at bus stops. The agreement further provided that after such formal notification the city would assume responsibility for any resurfacing of the abandoned car tracks and title to all said tracks including the rails, ties, and other track fixtures and appurtenances "is hereby vested to the City and the City assumes full possession and control thereof (this agreement being construed as a quitclaim deed thereto), and from said date forward the Company and its successors and assigns are relieved of all future liability of the maintenance, repair or removal of said tracks and all paving obligations incidental thereto * * *."

In a letter dated August 31, 1956, defendant formally notified the city of its abandonment of service and trackage as of August 20 and enclosed a check to the city in the amount above noted, which check was received by the comptroller on September 4, 1956.

In the afternoon of October 13, 1956, plaintiff, in pursuit of a suspected speeder, was operating his motorcycle north on North Broadway near Dickson Street and between the rails of the northbound streetcar track when he lost control of the motorcycle, fell from it and was injured. We shall state the evidence as to the manner of the occurrence hereinafter. For the present we shall assume that a defect in the street in the nature of a depression between the northbound streetcar rails was a cause of plaintiff's fall and injury and that such defect had existed for four or five years prior to plaintiff's accident, and that no one in the last four or five years had altered or repaired the

street at the place in question to the date of plaintiff's accident.

Defendant contends that the decisive issue is whether it had the duty to maintain the tracks and street **after** it had lawfully abandoned the tracks and divested itself of title to the rails by a contract with the city. There is no doubt that defendant's duty to exercise care to maintain the street in a reasonably safe condition for travel ceased upon its abandonment of the tracks and service thereover pursuant to lawful authority and pursuant to an agreement with the city, except perhaps a duty to the public after abandonment to remove the rails and restore the street. 83 C. J. S., Street Railroads, § 121, p. 240; Pennsylvania Dept. of Highways v. Pennsylvania Public Utility Commission, Pa. Super., 98 A. 2d 199, 201 [1-3]. But inasmuch as plaintiff relies on no such duty (after abandonment) we shall proceed upon the premise that at the time of plaintiff's injury, defendant had no duty to maintain the street in a reasonably safe condition. We do not agree, however, that the fact that no duty existed to maintain the street **after** abandonment or **at the time of plaintiff's injury** is decisive of the issue presented.

It is undisputed that defendant, prior to the time of its abandonment of service and tracks, had a continuing and nondelegable duty to exercise ordinary care to maintain the portion of the street in question in a reasonably safe condition for the use of the public. Such was defendant's duty both under the common law and by virtue of the St. Louis charter and ordinance above noted. 83 C. J. S., Street Railroads, § 112, p. 229; 55 Am. Jur., Urban Transportation, § 110, p. 108; Burow v. St. Louis Public Service Co., Mo., 100 S. W. 2d 269, 270 [1, 2]. That duty was owed by defendant to every member of the traveling public, including plaintiff. Lowery v. Kansas City, Mo., 85 S. W. 2d 104, 110 [4-7]. Defendant breached that duty

by omitting to repair the defect in the street at the time it had the duty to so do and at a time when it reasonably could have foreseen that its failure to perform that duty was likely to result in future injury to members of the traveling public; and if a breach of that duty was a substantial factor in causing injury and damage to plaintiff Hildreth v. Key, Mo. App., 341 S. W. 2d 601; 607 [12-14]; it would appear that a submissible case was made insofar as concerns the contention being here discussed.

It seems apparent that defendant's omission to repair when it had a duty to the public, including plaintiff, to do so, was a substantial factor along with the joint negligence of the city which had the nondelegable duty to exercise care to maintain its streets in a reasonably safe condition, Fosmire v. Kansas City, Mo., 260 S. W., 2d 252, 254 [2, 3], in causing injury and damage to plaintiff and thus defendant's negligence constituted a legal or proximate cause. Hildreth v. Key, supra. In the circumstances of this case, including the relationship of the parties, i. e., plaintiff being a member of the class to whom defendant owed the duty to repair at the time it had that duty, the fact that at the time of the injury defendant no longer had the duty to maintain the street in a reasonably safe condition is of no decisive consequence. Plaintiff relies upon a breach of a duty committed at a time when defendant admittedly had the duty; he does not rely upon any breach of duty after defendant's duty had ceased to exist.

We recognize the fact that under our ruling herein one in the position of this defendant is liable for his negligence irrespective of the fact that a period of time has intervened between the time of its breach of duty and the time injury resulted to the one to whom it owed that duty. But, as pointed out in Comment H to Section 433, pages 1170 and 1171, Restatement, Torts, Negligence: "Experience has shown that where a great length of time has

elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof. Where the time has been long, the effect of the actor's conduct may thus, become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed. However, where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm."

In the present case it seems to us evident that defendant's negligence was a substantial factor in producing plaintiff's injury despite the intervention of a period of five or six weeks between the time of the breach of duty and the time of the injury.

While defendant's brief has stressed the fact and the content of its contract with the city, we understand that it does not contend that the contract, insofar as here relevant, did more than relieve it of its future, i. e., after abandonment, liability to exercise ordinary care to maintain the street in reasonably safe condition. Thus, the contract is of no decisive import because for the purposes of this case it is conceded that defendant had no duty to maintain the street after its lawful abandonment of service and tracks. No question is before us as to the effect of the contract as between the parties to it; for example, we are not concerned with whether the city may be liable over to defendant.

We have found no case which has ruled similar facts. The question here presented may have existed, but was not decided, in the case of Wells v. City of Jefferson, Mo., 132 S. W. 2d 1006. There plaintiff brought an action against the city and Missouri Power & Light Company, which company had operated a street railroad on the city

streets, for damages for an alleged injury caused by the defective condition of the street close to the rails of a streetcar track. The trial court directed a verdict for the company and the jury found for the city. On appeal one of plaintiff's assignments of error was that the trial court had erred in directing a verdict for the company. That assignment was not briefed and this court held that it had been abandoned and thus did not rule it. The facts in that case tended to show that plaintiff claimed to have been injured on April 21, 1934, after the streetcar tracks had been out of use for several months. The company had been granted permission to discontinue streetcar and substitute bus service in November 1933. The city had commenced to remove streetcar tracks but whether pursuant to an agreement with Missouri Power & Light Company is not disclosed. In any event, the particular tracks in question had not been removed and plaintiff's evidence showed that the defects had existed for two or three months. The opinion further shows that plaintiff contended on appeal that the trial court erred in admitting in evidence a minute entry of the city council dated February 3, 1934, which plaintiff said in its assignment of error "did not even import any final action, on the question of removing street car tracks from the city streets." It does not appear, therefore, just when the abandonment occurred and thus it is also not clear whether the defect of which plaintiff complained existed prior to the abandonment of the tracks or only subsequent thereto. The obvious reason that the case does not disclose those matters with particularity is because, as heretofore noted, the entire contention as to the liability of the Power & Light Company was abandoned and was no longer in the case. This court did comment, in connection with its stated refusal to consider or rule the question (132 S. W. 2d 1007: "Of course, this defendant's [the company's] liability would depend upon whether its duty with reference to

the track still existed. Burow v. St. Louis Public Service Co., 339 Mo. 1092, 100 S. W. 2d 269. However, this assignment is not briefed; no further mention is made of it, either in the points and authorities or argument, and no case is cited which considered any similar state of facts. This constituted an abandonment of this assignment. Clay v. Owen, 338 Mo. 1061, 93 S. W. 2d 914; Homan v. Mo. Pac. R. Co., 334 Mo. 61, 64 S. W. 2d 617. * * * It is, therefore, unnecessary to go into the facts concerning the taking over of the street car tracks by the City for salvage or otherwise." (Bracketed insert the present writer's.) The Burow case cited in the quotation above holds only that in the widening of St. Charles Road there involved the streetcar company was under no duty to the public because the roadway in question was a state highway and under the Constitution the Highway Commission controlled that highway and pursuant to that control had planned and executed the widening thereof, and the company could not have interfered either with the Highway Commission's plan for or with the construction in question. The court concluded that inasmuch as defendant owed no duty to the public, it was not liable to plaintiff, a member of the public. We are of the opinion that the comment in the Wells case above set forth did not and was not meant to rule the question here presented.

Defendant relies on Combow v. K. C. Ground Inv. Co., Mo., 218 S. W. 2d 539. That case holds that absent an express agreement to the contrary the seller of real estate is not liable for defective conditions of the premises. No vendor-vendee relationship exists in the present case and the questions in the two cases are wholly dissimilar. Defendant sold certain rails to the city, but by no stretch of the imagination does that fact change the relationship in the present case to one to which the principles governing liability as between a vendor of real property and his vendee are applicable.

Defendant relies on Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751. Kansas City's limits were extended and a street theretofore outside the city and which had been maintained by the county was within the new city limits. The court held that the city had the duty thereafter to maintain that street and was liable to a traveler for a negligent breach of that duty. The accident in the Foster case occurred after the city became responsible for the street and only the city was sued.

Defendant relies upon Cummings v. Halpin, Mo. App., 27 S. W. 2d 718. Kansas City had entered into a contract with a construction company to reduce the grade of one of the city's streets. A provision of the contract was that any sidewalks removed during the progress of the work should be relaid by the contractor in a manner satisfactory to the city. The contractor removed a walk and after finishing the grading, replaced the walk by placing large chunks of concrete from the former sidewalk along the side of the graded street. Plaintiff, going to a neighborhood store, was injured while using the walk when one of the concrete fragments tilted. The court held that there was no liability on the construction company because the city had accepted the work three days prior to the time plaintiff was injured. The court relied upon the rule stated in its prior case of Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330, that usually a contractor was not liable to third parties who had **no contractual relations with it** for damages subsequently sustained by reason of its negligence in the performance of contract duties, and further that the intervening negligence of the city or other party who accepted the work was the proximate cause of the injury, that negligence having superseded the original negligence of the contractor. Privity between a contractor and an injured party is probably not now necessary, Krisovich v. John Booth, Inc., Pa. Super., 121 A. 2d 890, and the city's acceptance

could not have been intervening negligence or a superseding cause for the reason that clearly the city's acceptance was nothing more than an act of concurring negligence, Seeley v. Hutchinson, Mo., 315 S. W. 2d 824, 826 [6-8]. Be that as it may, however, we need not decide whether the Cummings case is correctly ruled, because in no event is it applicable to any question here. In the present case there is involved no question of negligence of a contractor who has performed work under a contract with a municipality. In this case, defendant owed a continuing common-law duty to the public and no question of privity or of acceptance by the city of work tendered as compliance with a contract is involved.

In the present case defendant owed a continuing duty until abandonment not to injure a member of the public by negligently failing to keep the street in a reasonably safe condition. A breach of that duty (committed before abandonment) caused injury to plaintiff, a member of the class to whom the duty was owed. Under the applicable principles of tort law, the trial court correctly refused to direct a verdict for defendant on the ground asserted.

Defendant contends that the trial court erred in refusing to direct a verdict for it for the further reasons that there was no substantial evidence to support the hypothesis that any defect in the street was a proximate cause of plaintiff's injury and that the plaintiff was as a matter of law contributorily negligent. We state the evidence relevant to a determination of those two contentions from a standpoint favorable to plaintiff.

Plaintiff 56 at trial time, for 29 years had been attached to the traffic division of the St. Louis Police Force. When on duty he rode a two-wheel motorcycle. On October 13, 1956, at about four in the afternoon of a clear, dry day, he was riding his motorcycle north on North Broadway. When north of Franklin he observed a northbound auto-

mobile about a block ahead of him which he judged to be exceeding the speed limit of 30 miles per hour, and he started in pursuit. As he proceeded north for four or five blocks his motorcycle was about midway between the rails of the northbound streetcar track and he was gaining slightly on the automobile, attempting to get in a position to check its speed without calling attention of the driver to the fact that he was being pursued. When he reached a place about 20 feet or so south of Dickson Street his motorcycle ran into a depression or rut (about four or five inches wide and two or three inches deep) running parallel with and along the inside of the east rail of the northbound track for a distance of several feet. Within a few feet thereafter the motorcycle struck a galvanized sheet metal plate about a foot long by six inches wide, and a fraction (perhaps 1/8th) of an inch thick. An end or corner of that plate was wedged under the east rail and the plate protruded generally westwardly through the rut and out of it onto the surface of the street. Apparently the metal plate had been run over by heavy vehicles. In any event, it was flat against and conformed to the irregularities of the area it covered. There was no evidence that defendant was responsible for the presence of the metal plate. The motorcycle went out of control, traveled northeastwardly and struck Broadway's east curb. Plaintiff was thrown to the sidewalk at a place about 141 feet northeast of the metal plate.

Broadway's surface at the area in question (including the area from Franklin to Dickson), both to the east of the east rail and between the rails of the northbound track, was paved with cobblestones, which had been covered in some areas with asphalt. The street's surface was rough and at places was somewhat rougher between the northbound rails than it was east of the track. There was traffic to plaintiff's right when he began traveling northwardly, but probably there were times as he proceeded

when there was no traffic in the northbound lane east of the east rail of the streetcar track. He had traveled the portion of Broadway in question many times and was familiar with the fact that the street's surface was rough and that care was required to traverse it safely on a motorcycle. He had increased his speed so that at the time of the accident he was going 35 or 36 miles per hour. He did not sound his siren or operate a red light. At the time the motorcycle entered the rut plaintiff was attempting to watch the automobile ahead of him and his speedometer, and at the same time pay some attention to his direction and the condition of the street.

Defendant contends the evidence shows that the metal plate rather than the rut or depression was the proximate cause of plaintiff's injury. Defendant points to plaintiff's own testimony as to how the accident happened. A review of that testimony shows that certain of plaintiff's statements, standing alone and not considered in connection with plaintiff's other pertinent testimony, justifies the conclusion that only the metal plate caused plaintiff to lose control of his motorcycle. But when all of plaintiff's testimony pertaining to the present question is considered from a standpoint favorable to plaintiff, we are convinced that a jury was entitled to find that the rut or depression in the street was a concurring proximate cause of plaintiff's fall and injury.

In describing what happened, plaintiff testified: "Alongside of the east rail of Broadway where I struck this rut just south of Dickson Street and also passing over a piece of metal which was about two or three feet north of where I first struck this rut—as I struck this piece of metal, the motorcycle skidded and caused me to lose control and swerve to the right, which would be towards the east curb and trying to control it, I skidded and went to the curb rather, and the motorcycle struck the curb and I

went over the curb on the motorcycle and throwing me to the right side into the walk and the motorcycle continued down north several feet.

"Q. Now, about how long was this rut, officer? A. Well, I couldn't be exact just how long because I wouldn't know how long, it's quite a little distance.

"Q. I offer you Plaintiff's Exhibit A. I will ask you to look at that particular place there as shown in the picture and I will ask you if that's the place that you struck and from which you went into and over this metal plate and lost control of your motor? A. Yes, it's in this area right here, just south of this piece of metal, this galvanized metal which is under the track; when I struck this metal the motorcycle started to skid and I lost control and went toward the east curb and bouncing on those rough cobblestones I didn't seem to have any control over it at all after it left that metal.

"Q. When you first answered 'into that rut' did you try to get out of that rut? A. Yes.

"Q. What did you do to try to get out of the rut? A. The motorcycle skidded and bounced around and I was unable to control it at any time and then I struck the plate and the motor skidded some more after I left that and swerved to the right to the east curb line of Broadway, striking the curb."

Plaintiff later made these answers to these questions:

"Q. Did you, or did you not see the rut, did you, or did you not see the metal plate before the accident? A. No, I didn't see it. Like I say, I was in the rut and after I struck the rut and followed on up to where the metal was when I struck the metal, that's what caused me to skid and lose control of the motorcycle.

"Q. Well, did you ever—what you have referred to as a rut, sir, did you ever see that before this accident? A. No, sir.

"Q. Where were you looking at the time that you say that your motorcycle went into the rut? A. I was looking ahead at the automobile and also looking at the street at the same time."

And plaintiff stated at the trial that this question and answer were asked and answered at a deposition:

"Q. How did you happen to be injured at this place? A. Well, I struck a rut alongside, I was in the northbound rail, a rut alongside the east rail of the northbound tracks, now that's the east rail of the northbound track and the front wheel struck this rut and a piece of metal in that rut there caused me to lose control of the motorcycle at that time causing my injuries."

And then these questions and answers appear:

"Q. Were you asked that question and did you give that response? A. Yes, sir.

"Q. And then 'a piece of metal in that rut there' caused you to lose control of the motorcycle? A. Yes, after I struck the piece of metal the rut is like I said before I had struck, before I hit the metal.

"Q. Then it was that piece of metal in that rut that caused you to lose control, would that be correct? A. I believe so, yes, sir.

"Q. And is that still correct today? In other words, this testimony as you gave it in your deposition, was that correct? A. Yes, sir.

"Q. And is it still correct? A. Yes, sir."

On further cross-examination by defendant's same counsel who had been questioning him, plaintiff testified as follows:

"Q. Well, that's what happened after you hit the metal? A. I hit the metal yes, before I was in the rut, I had all I could do to try to balance the motorcycle; after it struck

the piece of metal I lost control and the motorcycle swung to the right to the east curb.

"Q. As I understand it, you were only in this rut for two or three feet before you struck the metal, is that correct? A. That's right, approximately.

"Q. Which caused you to lose control of the motorcycle? A. The rut is what caused me to lose control of the motorcycle. I struck the rut and the motorcycle started to wobble and I struck that piece of metal and I started to skid there within two or three feet that that happened."

Apparently plaintiff's testimony, until the last question noted above, was not clear to defendant's counsel as to whether plaintiff meant that only the metal plate or only the rut or both caused plaintiff to lose control; for as shown by the last-quoted part above (which was the last question and answer on the subject) **defendant's** counsel asked the question, "Which caused you to lose control of the motorcycle?" In answer to that specific question, plaintiff stated that it was the rut that caused him to lose control; that he struck the rut and the motorcycle started to wobble and that he then ran onto the piece of metal and started to skid.

While defendant correctly contends that plaintiff is bound by his own testimony, we are of the opinion that his testimony concerning the cause of his loss of control was such that a jury was entitled to find that the defect in the street, the rut, was a contributing or concurring cause of plaintiff's fall and injury. Although, as noted, defendant was not responsible for the presence of the metal plate, it nevertheless was liable if its negligence substantially contributed or concurred in causing the injury. That is to say, defendant was liable if its negligence was a proximate cause, even though its negligence was not the sole proximate cause. Caldwell v. St. Louis Public Service Co., Mo., 275 S. W. 2d 288, 292 [4, 5].

Defendant next contends that plaintiff's own testimony, as a matter of law, convicted him of contributory negligence. Defendant argues that inasmuch as plaintiff was under the duty to exercise the highest degree of care and the accident occurred during daylight in clear weather, on a dry street, and plaintiff drove into an easily discernible depression about 25 feet long, 4½ inches wide, and two or three inches deep, he was bound to have seen the depression in time to have avoided it. Defendant points to these matters as making it clear that in the exercise of the highest degree of care, plaintiff should have discovered the defect in time; he knew that the space between the northbound rails was at places rougher than the lane to the right of the track and he knew that the street's entire surface was rough; he was familiar with the area; he knew it was difficult to drive a motorcycle over that cobblestone street; he was watching the street; and he was exceeding the speed limit.

We have no difficulty in reaching the conclusion that plaintiff was not, as a matter of law, negligent. (Inasmuch as plaintiff's negligence was not pleaded, no question of contributory negligence was submitted to the jury.) True, plaintiff was familiar with the area, he knew the street was a rough one and that he needed to exercise care in traversing it. But he was a traffic officer and had an assigned job to do on that rough-surfaced street; he was actively engaged in the discharge of his duty at the place assigned; he was attempting to check an automobile's speed as it traveled in front of him to determine whether its driver was violating the law; he had to look ahead, look at his speedometer and at the same time watch his course of travel and the condition of the street. He was unaware of the precise location of the particular defect and he did not see it in time to avoid it. He was not sure why his course took him into the rut but a jury may

well have believed that he was doing as well as a very careful motorcycle policeman should have been doing under the same or similar circumstances.

Plaintiff's negligence is always a jury question unless it may be said from all the evidence and the reasonable inferences therefrom, viewed in the light most favorable to plaintiff, that the only reasonable conclusion is that plaintiff was negligent and that his negligence was a proximate cause of his injury. Eickham v. Carter, Mo., 314 S. W. 2d 902, 908 [8]. A jury in this case reasonably could have found that plaintiff was exercising care commensurate with the circumstances as he proceeded northwardly on Broadway immediately prior to and at the time of the accident.

Defendant contends further that the trial court erred in giving instruction 1. Defendant attacks only this third paragraph of that instruction: "So in the case before you now, if you find and believe from the evidence that the ordinance and Charter provision of the City of St. Louis read to you in the evidence applied to the defendant here and required it to keep the street in question in repair as submitted to you in other instructions given you by the Court, then it was the duty of defendant to keep the street in question, at the time and place submitted to you in such other instructions, in reasonably safe condition for the use of motorcycles."

Defendant's only complaint is that the paragraph above required the jury to determine the questions of law, viz., whether the city ordinance and charter applied to the defendant and required it to keep the street in a reasonably safe condition. There was no contention at the trial that the ordinance and charter provision read in evidence did not apply to the defendant and did not require the defendant to keep a portion of the street in reasonably

safe condition for use of the traveling public. And, of course, the charter and ordinance read in evidence were, as a matter of law, applicable to defendant prior to abandonment of its tracks and service. Defendant's refused instruction A offered to tell the jury as a matter of law that "during such time as the defendant operated streetcars over said street it was obligated to maintain the area adjacent to the streetcar tracks mentioned in the evidence." And, of course, defendant had a common-law duty to maintain a portion of the street while it operated thereover. Furthermore, it is apparent from reading all of instruction 1 that its purpose was to inform the jury that defendant's duty to maintain the street for the use of the traveling public included a duty to persons traveling on motorcycles as well as to persons using automobiles.

Under the noted circumstances, the instruction could not have been prejudicial for the reason ascribed by defendant.

Defendant's final contention is that the trial court erred in giving this instruction, No. 2: "The jury is instructed that if you find and believe from the evidence that prior to September 4, 1956, the defendant used streetcar tracks on Broadway near the intersection of Dickson Street for the operation of its streetcars, and if you further find that at the time the defendant abandoned said tracks to the City of St. Louis, there existed a trench or depression of from one to three inches in depth, several feet in length, and two or three inches in width, along the inside of the east rail of the northbound streetcar tracks, if you so find, and if you further find that by reason of the existence of said trench or depression, said street was not reasonably safe for use by motor vehicles, at the time the defendant abandoned said tracks, and if you further find that said depression in said street was caused by the failure of the

defendant to keep the same in repair, and if you further find that the failure of the defendant to keep said tracks in repair was negligence; and if you further find that plaintiff on October 13, 1956, was operating a motorcycle northwardly on Broadway at the time and place shown in evidence, and if you find from the evidence that plaintiff's motorcycle struck said trench or depression in said street, and that by reason thereof plaintiff lost control of said motorcycle, if you find he did lose control, and was thrown to the street or sidewalk, if you so find, and was injured thereby; and if you further find that plaintiff's injuries, if any, were directly caused by the condition of said street, and the depression therein, then your verdict must be for the plaintiff and against the defendant."

Defendant says the instruction erroneously assumed "that the duty of defendant to keep the area in a reasonably safe condition on or before September 4, 1956, continued on till October 13, 1956." As we read and understand the instruction, defendant's contention is not well taken. The September 4 date was, as heretofore noted, when defendant's check was accepted by the city and, consequently, was treated as the date of abandonment. The first part of the instruction made it clear that the defect hypothesized had to have existed at the time the defendant abandoned the tracks on September 4, 1956, and that such was the defect which the jury was to find made the street not reasnably safe and that such defect was there because defendant failed to repair it. The second part of the instruction made it clear that October 13 was the date of the accident. That date under all the evidence was after the tracks were abandoned. Consequently, it must have been clear to the jury that the defect which it was required to find plaintiff struck was the one which existed at the time of and which defendant had failed to repair by the time of abandonment.

Defendant contends further that the instruction permitted the jury to decide whether "defendant's negligence, if any, prior to September 4, 1956, caused plaintiff's injury on October 13, 1956." The instruction did so, but correctly in view of our prior holding herein. If plaintiff was entitled, under the applicable law, to recover for defendant's failure to have repaired the street when it had a duty to do so, for an injury received as a result of that failure after defendant no longer had a duty to repair, it was proper and in fact essential to require the jury to find that defendant's breach of duty when it had that duty was a proximate cause of plaintiff's subsequent injury.

The judgment is affirmed.

Cullen Coil, Commissioner.

Holman, C., Concurs.

Houser, C., Dissents.

RULING OF THE SUPREME COURT OF MISSOURI ON MOTION FOR REHEARING.

And afterwards on July 16, 1962 the following among other proceedings were had and entered of record, to wit:

Louis Vanacek, Respondent,

48,474 vs.

St. Louis Public Service Company, a Corporation, Appellant.

Now at this day the court having seen and considered respondent's motion for a rehearing in the above-entitled cause, doth order that said motion be, and the same is hereby overruled (R. 406).

ORDER OF THE SUPREME COURT OF MISSOURI GRANTING AN EXTENSION OF TIME WITHIN WHICH TO PETITION FOR CERTIORARI.

And afterwards on July 20, 1962 the following among other proceedings were had and entered of record, to wit:

Comes now the respondent, by attorney, and files herein a Motion for a stay of execution and stay of enforcement of judgment in the above entitled cause. And now the court having seen and considered respondent's motion to stay execution and stay of enforcement of judgment, doth order that said motion be, and the same is hereby sustained (R. 406).

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In the Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 427.

LOUIS VANACEK,
Petitioner,

vs.

ST. LOUIS PUBLIC SERVICE COMPANY,, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 427.

LOUIS VANACEK,
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vs.
ST. LOUIS PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

There is no authority conferring jurisdiction upon this Court in the instant case. More particularly, jurisdiction is not conferred under the Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U. S. C. A. 1257 (3), which provides:

> "'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

The total absence of jurisdiction is established by the following facts:

1. No federal question was timely raised, properly presented or ruled upon by the court below.

2. The decision of the Supreme Court of Missouri involved solely a matter of local law, contract and statute.

3. The decision of the Supreme Court of Missouri was consistent with applicable decisions of this Court.

4. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution has no application to the Petitioner's Question Presented in this case.

5. There is an absence of any federal question in this case.

QUESTIONS PRESENTED.

The Question Presented for Review by the Petitioner does not express the real issues.

There are three questions:

1. Is a party entitled to have a judgment of the highest court of a State reviewed by this Court where no appropriate action was taken in the state court to secure such review?

2. Apart from fatal procedural defects, does the Equal Protection Clause apply to a Plaintiff denied relief against a Defendant having no interest or ownership in, or control over, the premises containing the defective condition causing the injury complained of where the evidence (Def. Ex. 1; R. 287-293; Def. Ex. 4; R. 314; Def. Ex. 5; R. 315; Def. Ex. 6; R. 316) establishes that the Defendant divested itself of all interest and control in the premises six weeks before the injury occurred?

3. Can the action of the Supreme Court of Missouri in denying, without hearing or comment, Petitioner's Motion for Rehearing be considered as their having passed upon the federal question raised in the Motion for Rehearing?

ARGUMENT.

I.

No Federal Question Was Timely Raised, Properly Presented or Ruled Upon by the Court Below.

Petitioner argues that a contract between the Respondent and the City of St. Louis, to which he was not a party, forms the keystone of an abridgement of his rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. That such argument fails substantively will be established later herein, that it fails procedurally is patent. Petitioner offered no objection at the trial to the introduction of the contract (Def. Ex. 1; R. 287, 307) nor to any of the proceedings, reports or orders of the Missouri Public Service Commission from which the authority for the contract emanated (Def. Ex. 2; R. 296-307), nor was objection raised to any of the documents dated subsequent to the contract which established the effective date of the abandonment of the premises by the Respondent, under the contract, as September 4, 1956—six weeks before the Petitioner's injury (Def. Ex. 3; R. 314; Def. Ex. 4; R. 315; 316; Def. Ex. 5; R. 316; Def. Ex. 6; R. 316, 317).

A second opportunity was available to the Petitioner to raise federal questions as the appeal of his case proceeded to Division One, Supreme Court of Missouri, where argument of counsel was heard; again the Petitioner was silent.

The cause was then transferred to the Supreme Court of Missouri En Banc, there having been less than a majority vote in Division One. At this juncture, Petitioner was for a third time upon the threshold of opportunity and declined to cross. The assistance of Division One in preparing the majority and dissenting opinions not to be

filed[1] in the case but to aid counsel in their briefs to be used in the court en banc (App. 9, R. . . .) was ample notice of a divided judiciary on the issues of the case.

The Supreme Court of Missouri En Banc heard argument, rendered its opinion and its judgment and only at this point, in the afterglow of the litigation, did the Petitioner venture forth to seek rehearing upon constitutional grounds.

The law on these points is incisive. One of the earlier Missouri cases, *Phippin v. Mo. Pac. R. Co.*, 1906, 93 S. W. 410, 196 Mo. 321, involving a Petition for Rehearing before the State Supreme Court held:

> "To recognize the practice of injecting into a case for the first time after a final judgment and opinion by the Supreme Court a new proposition would be subversive to all our rules of practice and directly in the teeth of our rules".

Without citing cases from the years between, we quote briefly from *Center School District No. 58 of Jackson County v. Kenton*, Mo. 1961, 345 S. W. 2d 120, which stated:

> "Appellants' motion for rehearing or for transfer to the court en banc on the ground that they had been deprived of due process must be denied where the

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[1] In the Appendix to the Petition for Writ of Certiorari, p. 28, Petitioner states the opinion in this case by Hon. Cullen Coil, Comm'r, was filed in Division One. This is not correct, the opinion was never filed (App. 9, R. . . .) and any use of or reference to it is improper. The Supreme Court of Missouri has held that when a case is transferred from a division of the Supreme Court to the court en banc, the case stands as if it had not been previously heard and submitted and the original opinion of the Supreme Court which is rejected becomes a nullity as though it had never been written (See In Re Thomasson's Estate, Mo. 1946, 192 S. W. 2d 867).

Respondent has printed in its appendix, pursuant to Rule 23 (i) of the Rules of this Court, dissenting opinion from Division One which was adopted with amplification by the court en banc.

appellants did not invoke the due process clause either at trial or on appeal".

No series of citations is required to remind this Court of the occasions upon which it has ruled that the application by a state court of its local laws is controlling here, thus the prohibition under Missouri law of raising new issues, state or federal, on motion for rehearing is binding upon this Court (See *Scripto, Inc. v. Carson*, Fla. 1960, 362 U. S. 207, 80 S. Ct. 619, 4 L. Ed. 660).

It is axiomatic that denial of a motion for rehearing without hearing or opinion on the motion does not amount to the court having passed upon the questions raised in the motion (See *Mutual Life Insurance Company of New York v. McGrew*, Cal. 1903, 188 U. S. 291, 23 S. Ct. 375, to *Walters v. City of St. Louis*, Mo. 1954, 347 U. S. 231, 74 S. Ct. 505).

II.

Decisions of State Courts Involving Local Laws Provide No Basis for Invoking the Jurisdiction of the Supreme Court of the United States.

Black v. Cutter Laboratories, Cal. 1956, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188, rehearing denied 352 U. S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69, concerned a decision of the Supreme Court of California involving that court's application of local law in construing a local contract. Upon application for writ of certiorari, this Court stated that rulings of the highest court of a state on local law create no federal question and the petition would be dismissed.

Petitioner here is under circumstances similar to the Petitioner in *Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, Inc.*, Ala. 1952,

344 U. S. 178, 73 S. Ct. 196, in that this is the only case that can arise from the factual circumstances present at the time of the occurrence and under like conditions, it was held that the possibility of there never being a decision on the stated facts unless the Supreme Court took jurisdiction would not warrant the Court in enlarging its jurisdiction.

III.

The Action of the Supreme Court of Missouri on Petitioner's Motion for Rehearing is Consistent with Applicable Decisions of This Court.

Decisions of this Court that a federal question cannot be raised for the first time by a petition for a rehearing, after judgment in the highest court of a state, so as to bring the case within the appellate jurisdiction of the United States Supreme Court are legion, beginning with *Mergenthaler Linotype Company v. Davis*, Mo. 1920, 251 U. S. 256, 40 S. Ct. 133.

Also, assuming *arguendo* that there was involved a federal question, if there is also a non-federal question, as there is here, this Court has repeatedly held the non-federal question is sufficient to support the judgment and no jurisdiction arises in the federal Supreme Court. The existence of an adequate state ground to validate the judgment removes the case from consideration by this Court (See *Stembridge v. State of Georgia*, Ga. 1952, 343 U. S. 541, 72 S. Ct. 834; *Buck v. People of the State of California*, Cal. 1952, 343 U. S. 99, 72 S. Ct. 502; *Dixon v. Duffy*, Cal. 1952, 344 U. S. 143, 73 S. Ct. 193).

The application of Missouri tort law and the construction of a local contract between its residents is a sufficient non-federal ground to support the judgment of the Supreme Court of Missouri in this case.

IV.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States Has No Application to the Case Here Presented.

From the earliest interpretations, equal protection of the laws within the Constitutional guaranty has been held to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under similar circumstances (See *Bowman v. Lewis*, Mo. 1880, 101 U. S. 22, 25 L. Ed. 989; *Cunningham v. United States*, 256 F. 2d 467).

To constitute a denial of equal protection of laws, there must have been purposeful discrimination against one person in favor of another person in like circumstances without a rational basis for differentiation between the two. *Marquez v. Aviles*, 252 F. 2d 715, certiorari denied 356 U. S. 952, 78 S. Ct. 917. Obviously, the Petitioner here does not come within a class which was denied equal protection nor has he established discrimination between himself and another under the existing circumstances, thus there is no denial of his rights under the Fourteenth Amendment (see *Tonkins v. City of Greensboro*, N. C., 162 F. Supp. 549, opinion supplemented 175 F. Supp. 476).

V.

There Is No Federal Question Here Presented.

This action was decided by the highest court of the State of Missouri upon that court's interpretation of a local contract to which local law, common and statutory, was applied. The Missouri Supreme Court did not pass upon a federal question, nor was any before it; the *sub-*

stance of the action was non-federal and it does not require the citing of authority to conclude that no untimely *procedural* device can supply the fatal jurisdictional defect apparent from the Petition itself.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

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APPENDIX.

Dissenting Opinion From Division One, Supreme Court of Missouri.

In the Supreme Court of Missouri,
Division Number One.

September Session, 1961.

Louis Vanacek,
Respondent,
v.
St. Louis Public Service Company,
a Corporation,
Appellant.
No. 48,474.

Dissenting Opinion.

Following abandonment by defendant of the Broadway line with the permission of Public Service Commission, under contractual arrangements with the city, "* * * this defendant's liability would depend upon whether its duty with reference to the track still existed." Wells v. City of Jefferson, Mo. Sup., 132 S. W. 2d 1006, 1007. The duty of defendant to maintain the track in question in a reasonably safe condition and its right to use the street were coextensive with the existence of its permit. Compare The Brick and Terra Cotta Co. v. Hull, 49 Mo. App. 433; 83 C. J. S., Street Railroads, § 124. It was not a perpetual duty. The duty was contingent in nature, depending upon the continued existence of the relationship. The duty did not continue after the termination of the status or relationship between the Public Service Company, the city, and the public as to the Broadway car line. The duty no longer existed after the abandonment of the track and

permit by order of Public Service Commission; the signing of the contract between the Public Service Company and the city agreeing with respect to improvement of the abandoned track areas, title to and control of the abandoned facilities, liability for future repair and maintenance, etc., and the giving of the agreed-upon notice to the city. The opinion, after recognizing that "at the time of plaintiff's injury, defendant had no duty to maintain the street in a reasonably safe condition" (Opinion, page 3), nevertheless holds this not decisive of the case. The opinion allows plaintiff to recover for an injury which occurred after the termination of defendant's duty. It holds defendant liable upon the basis of a pre-existing duty which no longer attached, arising out of a status which no longer existed.

In 38 Am. Jur., Negligence, § 18, these principles are expounded: Actionable negligence is negligence to the particular person injured. The basis of an action for negligence must be a violation of plaintiff's own right. The obligation must be due from defendant to the person injured. Davidson v. St. Louis-San Francisco Ry. Co., Mo. Sup., 229 S. W. 786, 788. It is not enough to show that the obligation was to another person or class, and that if performed as to them, plaintiff would not have been injured. "The wrongfulness of an act is found in its probable effect upon persons who are in some relation to the actor. As to unrelated parties, the happening is a pure accident. Facts which create a relation and therefore a duty as to one person do not establish the same obligation to all mankind. Accordingly, to be within the right created, the complaining party must show facts which make the reason for claiming a relationship applicable to him." In some situations the duty to use due care is general and owing to everybody. "A duty, however, which is owing to everybody cannot serve as the basis of an action for negligence until some individual is placed

in position which gives him occasion to insist upon its performance." 38 Am. Jur., Negligence, § 19. It then becomes a duty to him personally. 3 Cooley on Torts, 4th Edition, § 478, p. 366; Upp v. Darner, Iowa Sup., 130 N. W. 409, 410. In Upp v. Darner defendant, owner of a city lot, strung a barbed wire across the lot, contrary to a city ordinance. Then he sold the lot to another. Thereafter plaintiff's horse was injured and had to be killed, after coming in contact with the barbed wire. Plaintiff was an invitee of the purchaser. Held, no liability on the former owner because he was in no position to control the use of the property and under no duty to the grantee's invitee; plaintiff was a stranger to defendant, and defendant did not invite plaintiff onto the property.

Defendant Public Service Company owed the general traveling public a duty as long as it enjoyed its license as a carrier on the Broadway line. During the time it owed that duty, however, plaintiff was not placed in a position which gave him occasion to insist upon its performance. It was not until the relationship between the carrier and the public came to an end and the duty no longer existed that plaintiff's injury occurred and his rights arose. Then plaintiff and defendant were unrelated; were strangers. Defendant's rights and duties with respect to the maintenance of the tracks and space between them were then nonexistent. At that time defendant had no duty to inspect and no right to repair a discovered defect in the street or track, even if it had desired to do so. At that time defendant owed no duty with respect thereto to any member of the public. Plaintiff's only recourse was against the city under its duty to maintain the streets in a reasonably safe condition for the traveling public.

An action for negligence will not lie unless it appears that there existed, *at the time of the injury*, some legal duty or obligation on the part of defendant toward plain-

tiff, which defendant did not perform. 38 Am. Jur., Negligence, § 12; 83 C. J. S., Street Railroads, § 302 b, p. 446; 65 C. J. S., Negligence, § 186 a, p. 872; The Evansville and Terre Haute Rd. Co. v. Griffin, 100 Ind. 221, 222; Daugherty v. Herzog, Ind. Sup., 44 N. E. 457. The Kansas City Court of Appeals stated the rule, in a landowner-invitee case, as follows: "The precise duty that he owes depends upon the relationship that exists between the parties at the time an injury is suffered." Jennings v. Industrial Paper Stock Co., Mo. App., 248 S. W. 2d 43.

"No duty to plaintiff at time of injury, no liability on defendant." This is the general rule in vendor-vendee cases. Combow v. Kansas City Ground Investment Co., Mo. Sup., 218 S. W. 2d 539, and is the proper rule to apply in this comparable situation.

Respectfully submitted,

Houser, C.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

LOUIS VANACEK,
Petitioner,

vs.

ST. LOUIS PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

No. 427.

Certiorari to the Supreme Court of Missouri.

PETITIONER'S REPLY BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

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Certiorari to the Supreme Court of Missouri.

PETITIONER'S REPLY BRIEF.

ARGUMENT.

Petitioner respectfully states that Respondent's Brief heretofore filed herein actually presents only two propositions advanced with any color of merit, and that the same are these:

1. That no Federal question was timely raised (R's brief, pp. 2, 3-5).

2. That "petitioner does not com[illegible] within a class which was denied equal protection (R's brief, 2, item '4', and 7, item 'IV')."

We should like to be heard in opposition as follows:

I.

The Federal Question Was Timely Raised Under the Circumstances of This Particular Case.

We recognize a general rule to the effect that a Federal question is raised too late if first raised in a motion for rehearing directed to a final decision and opinion of the highest State Court.

However, this general rule is subject to an exception to the effect that the general rule does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right." **Great Northern Railway Co. v. Sunburst Oil and Refining Co.**, 287 U. S. 358, 367, 53 S. Ct. 145, 77 L. Ed. 360.

It was not understood below that the contract between the respondent here and the City of St. Louis did anything more than relieve respondent "of its future, i. e., after abandonment, liability to exercise ordinary care to maintain the street in a reasonably safe condition," and it was understood, at least by the majority of the Commissioners who prepared an opinion for Division One of the Supreme Court of Missouri, that respondent did not contend otherwise (petition herein, pp. 28, 31, 36, 50).

Yet the Court en banc, by its opinion, declared the existence and terms of the said contract to be the determining factor in ruling respondent's cause of action (opinion of Court en banc, petition, pp. 20, 22, 25, 26).

No such view had been held by any judicial body passing on the case before the Supreme Court, en banc, advanced it. Two learned Commissioners of Div. One of the Supreme Court of Missouri stated, in the course of an opinion which they prepared to be the law of this case, that not even respondent contended for any such view (petition, pp. 28, 31, 36, 50).

We think that this should be enough to move this Court to at least inquire further (by way of granting the writ herein sought) into the question of whether or not the Federal question is here seen as timely raised.

II.

Petitioner Was Shown to Be a Member of a Class Denied Due Process of Law (or the Equal Protection of the Laws).

Throughout these proceedings in this Honorable Court, we have leaned most heavily on the opinion written for Division One of the Supreme Court of Missouri by Hon. Cullen Coil, Commissioner, and concurred in by Hon. Lawrence Holman, Commissioner (petition, pp. 31-50).

We have done so not under any theory that anything therein said is binding on this Court as any decision of any Court, but merely because the same constitutes a correct exposition of the law governing this case (in language better than any we could devise or employ), while the opinion of the Missouri court en banc is incorrect, especially with regard to the way in which the latter denies petitioner's Federal constitutional rights by giving effect to a private contract to which he was not a party.

For this reason, we made the whole said opinion of said Hon. Coil part and parcel of our Motion for Rehearing below (petition, p. 28), and we consider every word

and figure thereof therefore properly before this Court for its consideration as an argumentative exposition of what the law is.

On this lack of "class" in petitioner, therefore, we respectfully refer this Court to this language contained in said opinion, found in our petition herein, pp. 34-35:

> "It is undisputed that defendant, prior to the time of its abandonment of service and tracks, had a continuing and nondelegable duty to exercise ordinary care to maintain the portion of the street in question in a reasonably safe condition for the use of the public. Such was defendant's duty both under the common law and by virtue of the St. Louis charter and ordinance above noted. 83 C. J. S., Street Railroads, § 112, p. 229; 55 Am. Jur., Urban Transportation, § 110, p. 108; Burow v. St. Louis Public Service Co., Mo., 100 S. W. 2d 269, 270 [1, 2]. That duty was owed by defendant to every member of the traveling public, including plaintiff. Lowery v. Kansas City, Mo., 85 S. W. 2d 104, 110 [4-7]. Defendant breached that duty by omitting to repair the defect in the street at the time it had the duty to so do and at a time when it reasonably could have foreseen that its failure to perform that duty was likely to result in future injury to members of the traveling public; and if a breach of that duty was a substantial factor in causing injury and damage to plaintiff, Hildreth v. Key, Mo. App., 341 S. W. 2d 601, 607 [12-14], it would appear that a submissible case was made insofar as concerns the contention being here discussed.
>
> It seems apparent that defendant's omission to repair when it had a duty to the public, including plaintiff, to do so, was a substantial factor along with the joint negligence of the city which had the

nondelegable duty to exercise care to maintain its streets in a reasonably safe condition, Fosmire v. Kansas City, Mo., 260 S. W. 2d 252, 254 [2, 3], in causing injury and damage to plaintiff and thus defendant's negligence constituted a legal or proximate cause. Hildreth v. Key, supra. In the circumstances of this case, including the relationship of the parties, i. e., **plaintiff being a member of the class to whom defendant owed the duty to repair at the time it had that duty**, the fact that at the time of the injury defendant no longer had the duty to maintain the street in a reasonably safe condition is of no decisive consequence. Plaintiff relies upon a breach of a duty committed at a time when defendant admittedly had the duty; he does not rely upon any breach of duty after defendant's duty had ceased to exist" (emphasis supplied).

It is again respectfully submitted that this Court ought to grant petitioner the writ he seeks.

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